STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee

Supreme Court No. _____

Court of Appeals No. 326311

Lower Court # 14-009512-01-FC

vs.

ELISAH KYLE THOMAS,

Defendant/Appellant

_____/

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff/Appellee

_____

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_____

APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS PRESENTED

I. Was the single photo identification of Mr. Thomas so impermissibly suggestive that it gave rise to a substantial likelihood of misidentification?

The Trial Court answers, "Yes."

The Court of Appeals Majority answers, "No."

The Defendant/Appellant answers, "Yes."

The Court of Appeals dissent answers, "Yes."

II. Did the complainant have an independent basis to identify Mr. Thomas in court?

The Trial Court answers, "No."

The Court of Appeals Majority did not answer.

The Defendant/Appellant answers, "No."

The Court of Appeals dissent answers, "No."

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

This case arises from the identification of Defendant/Appellant Elisah Kyle Thomas ("Mr. Thomas") obtained when an inexperienced patrol officer showed a single cell-phone photograph of Mr. Thomas to the victim in the hospital, where the victim had been for less than an hour awaiting treatment for the nonfatal gunshot wound that Mr. Thomas was later charged with inflicting.

Wayne County Circuit Court Judge Catherine L. Heise suppressed the pretrial identification, finding that it was unduly suggestive and unnecessary. She also suppressed the later in-court identification, finding that that it had no basis independent of the previous improper identification. (See Exhibit 1, Opinion and Order Granting Defendant's Motion to Suppress Identification, dated February 6, 2015)

The Wayne County Prosecutor appealed Judge Heise's ruling to the Court of Appeals, which reversed her ruling in a 2-1 decision. *People v Thomas*, unpublished opinion of the Court of Appeals, entered December 8, 2016 (Docket 326311).

The Court of Appeals majority held that the photographic identification was not impermissibly suggestive and was not subject to suppression as a violation of due process. because the police could have attempted an on-the-scene identification if the victim had not been in need of immediate medical care, and showing a single cell phone photograph to the victim at the hospital was not so impermissibly suggestive as to violate due process. The majority did not address whether the later in-court identification should have been suppressed.

In contrast, Judge Shapiro in his dissent concluded that the trial court's findings of fact were not clearly erroneous and that its rulings were correct as a matter of law. He noted that "the trial court conducted a thorough evidentiary hearing, made factual findings as to the totality of the circumstances consistent with the evidence and correctly applied the law." *People v Thomas*, unpublished opinion of the Court of Appeals, entered December 8, 2016 (Docket 326311), p 1 (SHAPIRO, J., dissenting).

WHEREFORE, as discussed in detail in the remainder of the application, Mr. Thomas asks that his Honorable Court reverse the decision of the Court of Appeals and affirm the dismissal of his case by the trial court.

Respectfully submitted,

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Dated: February 2, 2017

STATEMENT OF FACTS

Elisah Kyle Thomas ("Mr. Thomas") was charged with one count of Assault with Intent to Murder in violation of MCL 750.83; one count of Robbery - Armed in violation of MCL 750.529; one count of Assault with Intent to Do Great Bodily Harm Less than Murder in violation of MCL 750.84; one count of Weapons - Dangerous Weapon - Carrying with Unlawful Intent in violation of MCL 750.226; one count of Weapons Felony Firearm in violation of MCL 750.227b; and one count of Weapons - Carrying Concealed in violation of MCL 750.227.

A preliminary examination was held on October 31, 2014. The case was bound over to the Wayne County Circuit Court and assigned to the Honorable Catherine L. Heise. The defense filed a motion to suppress identification. A Wade hearing was held on January 30, 2015. Judge Heise granted the defense motion to suppress on February 6, 2015, and an Order of Dismissal was entered on February 10, 2015. The prosecution appealed Judge Heise's order of February 6, 2015. In a split decision, the Court of Appeals, on December 8, 2016, reversed Judge Heise's order and remanded to the trial court for further proceedings.

The complaining witness, Dwight Dykes, testified at both the preliminary examination[1] and the evidentiary hearing. The testimony and evidence show that Mr. Dykes was shot and wounded on October 27, 2014, as he returned home from a Coney Island restaurant located at Greenfield and West Seven Mile in Detroit. (PET, 4-5; MT, 5) The incident occurred in the evening when it was dark. *Id.* Mr. Dykes was walking down Clarita toward Forrer when a person with a gun approached him and told Mr. Dykes to give him everything in his pockets. (PET, 5) Mr. Dykes gave the person $10.00, but the person kept demanding that Mr. Dykes give him everything. (PET, 7) The person fired two shots, one at the ground and one in the air, and Mr. Dykes ran across Clarita. (PET, 7) The assailant shot at him, wounding him in the left leg. (PET, 8) Mr. Dykes went to his church, where the pastor provided assistance and called an ambulance. Mr. Dykes was transported to Sinai-Grace Hospital. (PET, 9)

[1] References to the preliminary examination transcript are abbreviated as "PET" and references to the motion hearing transcript are abbreviated as "MT."

Mr. Dykes had seen the assailant walking down Forrer Street 10 or 15 minutes prior to reaching the Coney Island. (PET 9; MT, 12) This was the only time prior to the assault Mr. Dykes had seen the assailant. (PET, 9; MT, 7) The assailant wore a hood, thus Mr. Dykes could see the "outer part" of his assailant's face – eyes, eyebrows, nose and mouth. (PET, 10; MT, 5, 7) It was dark, the assailant was wearing all black, and Mr. Dykes could not identify the kind of pants the assailant wore or whether there were any logos on the clothing. (PET, 13) He did not observe the assailant's ears. (MT, 6) Mr. Dykes did not notice anything unusual about the person's appearance. (PET, 16; MT, 22)

Mr. Dykes recalled that about 15 minutes elapsed between the shooting and the time he was loaded onto the ambulance, and it took about 10 to 15 minutes to get to the hospital. (MT, 8) Within about 5 or 10 minutes, he spoke to a police officer, who showed Mr. Dykes one cell phone picture. (PET, 17; MT, 9; see also Exhibit 2, photograph used at Motion Hearing) At the time he spoke to the officer, he had not yet been seen by a doctor, he was still bleeding, and the officer was walking along side him as he was being pushed to a hospital room. (MT, 10; 16-17) At the preliminary examination, Mr. Dykes had not been sure whether the officer was male or female. (PET, 17) At the motion hearing, he testified that the officer was a female. (MT, 8) When Mr. Dykes looked at the photo, he was not told to take a good look, a second look or a third look. (MT, 23) Mr. Dykes stated that the police officer asked him, "was this the person who shot you?" (MT, 11) Mr. Dykes testified that the officer did not say that it might not be the defendant, or how she obtained the photo. (MT, 17) Mr. Dykes said the person in the single photograph was his assailant, and this was his first and only identification of the defendant outside the courtroom.

At the hospital, Mr. Dykes described the assailant as about five-nine and or either 145[2] or 200 pounds, "wearing all black," and that he "couldn't really see his facial hair." (PET, 16; MT, 46, 50-51) At the motion hearing, Mr. Dykes testified he could see facial hair on the assailant. (MT,

[2] At the preliminary examination, Mr. Dykes said the assailant was 145 pounds. (PET, 16) At the motion hearing, the police officer testified that Mr. Dykes told her the assailant was 200 pounds. (MT, 46, 50-51)

14) When confronted with the contradiction, Mr. Dykes explained he could not really see facial hair, the incident happened so fast and his adrenalin was up. (MT, 15)

At the Wade hearing, Mr. Dykes testified he first observed the assailant on Prevost Street for about three seconds. (MT, 20) Mr. Dykes glanced at the person. *Id*. The area had no lighting. (MT, 20-21) The robbery encounter on Clarita last about six to seven seconds (MT, 6-7), during which time Mr. Dykes's "adrenalin was up", and the assailant was about two feet or half an arm's length from him. (MT, 7, 15) Again, there was no lighting in the area. (MT, 5) Mr. Dykes reiterated that he saw the person's face from forehead to chin, but could not see his ears. (MT, 5)

Officer Samellia Howell testified that she was dispatched to the scene, with information that the suspect was described as a black male wearing dark clothing, with a youthful appearance. (MT 24, 31) She saw the defendant, Elisah Thomas, at the Exxon Mobil gas station at Greenfield and Clarita, about 50 feet away from the shooting site. (MT, 24-25, 35) He was with another person. (MT, 38) Officer Howell testified she did not have probable cause to arrest Mr. Thomas, but she stopped him, got his name, patted him down and ran him through the LEIN. (MT, 27-28) The LEIN gave his address and revealed he had no criminal record. (MT, 28) Officer Howell took a cell phone photo of Mr. Thomas. (MT, 28) She went to Sinai-Grace, where Mr. Dykes was being treated. (MT, 30).

Officer Howell testified that the Detroit Police Department procedure does not allow officers to take suspects to a hospital room for a showup identification. (MT, 36) There is no procedure allowing officers to show a cell phone picture to a witness. (MT, 37) According to Officer Howell, Mr. Dykes told her he had seen the assailant around the neighborhood. (MT, 31) She showed the photo to Mr. Dykes and asked him, "was this the guy who shot you?" (MT, 32) She testified she did not indicate whether Mr. Thomas was in custody, or that she thought he was the person who assailed Mr. Dykes. (MT, 33) She stated that Mr. Dykes began to tear up and said, "that's him." (MT, 33-34) Officer Howell testified from page two of her report, which she composed after speaking to Mr. Dykes,

that the suspect was about five-nine, around 200 pounds, and roughly between the ages of 15 and 20.[3] (MT, 46, 51) At the Wade hearing, Mr. Dykes testified that he told the officer that the assailant looked like him – he had the same complexion (dark) and was the same size, five-nine and 145 pounds. The assailant had on a black hood but Mr. Dykes did not know what type of pants he had on. (MT, 22-23)

As a patrol officer, Howell had no expertise in performing lineups and had never done a six-pack photo lineup. (MT, 44)

Investigator Glenda Fisher was the officer in charge of the case. (MT, 53) Her duties as an investigator included composing six-pack photo lineups and conducting other identification procedures. (MT, 54) She also testified that the Detroit Police Department has no policy regarding cell phone identification. (MT, 54) The department has a computer program available that allows the investigators to compose photo lineups based on the similarity to a single available photo. (MT, 55) Driver's license photos as well as mug shots are available. (MT, 54-55) Photos from other sources, such as driver's licenses, tend to stand out in a photo lineup because they are different sizes and have different backgrounds than mug shots. (MT, 57) Showing a witness a single person would single that person out. Investigator Fisher had never shown a witness a cell phone picture. (MT, 62) Generally, she would only use a single photo for identification purposes, for example, when people live next door to each other and the person is named "Mary" – in other words, when people are known to each other. (MT, 63) The department also has no policy for showing one picture for identification purposes. (MT, 63)

[3] Judge Heise asked Mr. Thomas his height at the Motion Hearing and he said he was 5'8" or 5'9". (MT, 65)

LEGAL ARGUMENT

I. The single photo identification of Mr. Thomas was so impermissibly suggestive that it gave rise to a substantial likelihood of misidentification.

Standard of Review·

"On review, the trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528, 534 (1993) (citations omitted).

The court reviews a trial court's decision to suppress identification evidence for clear error, but reviews underlying questions of law do novo. *People v McDade*, 301 Mich App 343, 836 NW2d 266 (2013).

Whenever an identification procedure is so unnecessarily suggestive and conducive to irreparable mistaken identification that it denies due process of law, it must be suppressed. *Stovall v Denno*, 388 US 293, 302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967); *People v Kachar*, 400 Mich 78, 90; 252 NW2d 807 (1977); *Manson v Brathwaite*, 432 US 98; 97 S Ct 2243; 53 L Ed 2d 140 (1977). A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. US Const. AM XIV; Const 1963 art I sec 17; People v Gray, 457 Mich 107; 577 NW 2d 92 (1998); *Simmons v United States*, 390 US 377, 384; 88 S Ct 967, 971; 19 L Ed 2d 1247 (1968). When a witness is shown only one person or a group in which one person is singled out in some way, the witness is tempted to presume that he is the person. *People v Anderson*, 389 Mich 155; 178, 205 NW2d 461, 470 (1973). The exhibition of a single photograph is "one of the most suggestive photographic identification procedures that can be

used." *Gray* at 11, 577 NW2d at 94, citing Sobel, *Eyewitness Identification* (2d ed)., §5.3(f), page 5-42. The United State Supreme Court has stated that the risks inherent in identification are not the "result of police procedures intentionally designed to prejudice an accused," but rather derive "from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of pretrial identification." *United States v Wade*, 388 US 218, 235; 87 S Ct 1926 at 1936; 18 L Ed 2d 1149 (1967).

The suggestiveness of an identification procedure is determined by considering the totality of the circumstances surrounding the procedure. *Stovall*, supra at 301-302. and *People v Lee*, 391 Mich 618, 626 (1974). In ascertaining whether a pretrial identification procedure is impermissibly suggestive, a court must look to the totality of the circumstances, especially the time between the criminal act and the procedure, and the duration of the witness's contact with the perpetrator during commission of the offense. *People v Johnson*, 58 Mich App 347, 352-355 (1975), and *Neil v Biggers*, 409 US 188, 199; 93 S Ct 375; 34 L Ed2d 401 (1972).

No identification procedure, photographic or corporeal, whether the accused is in custody or not, may be unnecessarily suggestive and conducive to irreparable misidentification. *People v Anderson*, *supra*. An identification procedure is flawed if it tends to suggest the response desired, *People v Prince*, 54 Mich App 699, 702 (1994), so as to create a "very substantial likelihood of misidentification." *Neil v Biggers*, *supra*.

A defendant's right to due process includes the right not to be the object of suggestive police identification procedures that make an identification unreliable. *Manson v Brathwaite, supra*. An identification procedure may be deemed unduly or unnecessarily suggestive, if it is on police procedures that create "a very substantial likelihood of irreparable misidentification." *Perry v New Hampshire*, 132 S Ct 716, 720 (2012) (quoting *Simmons v United States, supra*). As the Supreme Court noted, one-on-one show-up identification procedures have been "widely

condemned" because they are inherently suggestive. *Stovall v Denno, supra*.

In the current case, the photograph itself increases the suggestive nature of a single picture. Mr. Thomas is clearly pictured in the area where the incident occurred. The photo was presented to Mr. Dykes within an hour of the shooting. What could Mr. Dykes conclude, except that the police had already apprehended and photographed the assailant? Were the police going to show him photographs, one by one, of people they did not believe were involved in the incident just to rule them out? Why would the police rush to the hospital to do that? If the police did not think that Mr. Thomas was the assailant, why did they rush to the hospital to show Mr. Dykes the single photograph?

The prosecution argued below that, because the cell phone photo was shown to Mr. Dykes within an hour of the assault, the victim's identification by way of the sole photograph was the function equivalent of a “showup”, as was the subject in *Stovall v Denno, supra*. The *Stovall* court, while upholding the victim's identification of her assailant at an in-hospital "showup", recognized that “the practice of showing suspects singly to persons for the purpose of identification” has been “widely condemned”. *Id*. at 301, 388 S Ct 1972. The *Stovall* court explained that a claimed violation of due process of law depends “on the totality of the circumstances surrounding it.” *Id*. The Court noted the need in the *Stovall* case for immediate action, that the victim might die, and that bringing the defendant to the victim was the only “feasible procedure”, *Id*.

However, the prosecution did not cite any case law that explicitly equates a photographic identification with a “showup.” Indeed, there is none and the Detroit Police department has no such procedure. There is no legal authority to support that temporal proximity between the crime and the exhibition of a single photograph by itself overcomes the constitutional infirmity of impermissible suggestiveness. Contrary to the prosecution argument, the trial judge did not find such a procedure would never be acceptable. Rather, the judge

properly found, taken as a whole, the facts in the present case did not call for such action. There was no showing of the mortal exigency that was critical to the analysis in *Stovall*.

The Court of Appeals Opinions

The Court of Appeals reversed Judge Heise's ruling in a split decision. The decision of the Court of Appeals majority should be reversed for the reasons set forth in the dissent and set forth below.

The majority cited *People v Hallaway*, 389 Mich 265, 282; 205 NW2d 451 (1973), for the proposition that a one-person confrontation is not per se a violation of due process and *People v Winters*, 225 Mich App 718, 725; 571 NW2d 763 (1997), for the proposition that a one-person confrontation may be reasonable practice to determine if a suspect is involved in a crime. *People v Thomas*, unpublished opinion of the Court of Appeals, entered December 8, 2016 (Docket 326311), p 3 (hereinafter styled "Thomas, majority at –").

The majority states that the "relevant inquiry is whether the identification process was unduly suggestive in light of all of the surrounding circumstances, including (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Kurylczyk*, 443 Mich at 306 (opinion by GRIFFIN, J.). The question is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Neil v Biggers*, 409 US 188, 199; 93 S Ct 375; 34 L Ed 2d 401 (1972)." *Thomas*, majority at 3.

As Judge Shapiro noted in his dissent, neither *Neil* nor *Kurylczyk* involved a single-photo

identification. *Thomas*, dissent at 10. *Neil* concerned an in-person live showup (*Neil*, 409 US at 195) and *Kurylczyk* involved a six-photo array (*Kurylczyk*, 443 Mich at 293). *Id*. Neither *Neil* nor *Kuylczyk* is even factually applicable to this case and whether it is proper to even consider the factors applicable to the facts in those cases is not at all clear. *Id*. For the sake of argument, however, the factors will be reviewed below in light of the cases cited by the majority.

The majority cited *People v Woolfolk*, 304 Mich App 450; 848 NW2d 169, aff'd 497 Mich 23; 857 NW2d 524 (2014), a case where the Court of Appeals upheld a single-photo identification under very different circumstances. In *Woolfolk*, the witness was shown a single photograph of the defendant. The Court of Appeals held that "the photograph was used only to help confirm the identity of the person the witness had *already identified*—using a nickname—as the shooter. The witness testified that he knew, and grew up with, the shooter. Under these circumstances, the use of a single photograph did not create a substantial likelihood of misidentification and, therefore, did not violate defendant's right to due process." *Woolfolk* at 457-58 (emphasis added).

Woolfolk differs significantly from this case. *Woolfolk* was not a stranger identification case. Unlike the witness in *Woolfolk*, Mr. Dykes had not already named his assailant by nickname. Although the police officer claimed that Mr. Dykes had told her that he knew the assailant from the neighborhood (MT, 31, 39), Mr. Dykes himself testified that he had seen the assailant only once before the robbery, that being when he had passed him on the street ten minutes before the robbery. (MT, 13, 16, 23) The degree of familiarity set forth in *Woolfolk* was never alleged in this case. Mr. Dykes himself never said he knew Mr. Thomas and he most certainly did not say that he had grown up with Mr. Thomas. *Woolfolk* is not apposite to this

case.

The majority misstates the holding of another case involving a single-photo, *People v McAllilster*, 241 Mich App 466, 472; 616 NW2d 203 (2000), remanded in part on other grounds 465 Mich 884 (2001). The majority states that the Court of Appeals concluded that the single-photo identification of the defendant had been suggestive, but permissible. It did not.

In *McAllilster*, the police did not have a mug shot of the defendant. Rather, the only photograph they had of defendant was of him on a boat. Believing that an array using that photo would have been impermissibly suggestive, the police showed the witness the single photograph of the defendant on the boat. The witness later identified the defendant in court. The defendant challenged the independent basis for the in-court identification, alleging it was tainted by the showing of the single photograph.

The majority stated that the *McAllilster* Court found the pretrial identification acceptable, which is not what was said. The *McAllilster* Court upheld the in-court identification *despite* the improper pretrial identification: "However, when a *pretrial* identification has been *improperly* conducted, an *independent basis* for any *in-court* identification must be established. *Id.* at 114–115, 577 N.W.2d 92. In the present case, Webb testified that there was an independent basis for his identification because he could not recall ever being shown a photograph of defendant by police. Rather, Webb testified that the distance, daylight, and duration surrounding the circumstances of the assault was sufficient to allow him to identify defendant, who had in Webb's opinion, attempted to alter his appearance at the time of trial. *People v. Kachar*, 400 Mich. 78, 83, 252 N.W.2d 807 (1977). Accordingly, we cannot conclude that the trial court's decision to admit identification evidence was clearly erroneous. *Kurylczyk, supra."* *McAllister*,

241 Mich App at 472–73 (emphasis added).[4]

The majority discussed *People v McRaft*, 102 Mich App 204, 211; 212 n 2; 301 NW2d 852 (1980), in which a hospitalized victim was shown three photographs and identified the third one as the defendant, as if to say that all such procedures are acceptable. The facts of *McRaft* are very different from the case at bar. (They are also different than as set forth by the majority in this case. See below.) In *McRaft*, unlike this case, the incident occurred during the afternoon, not at night on an unlit street. In addition, the victim spent much more time with his assailant than in the case at bar. The victim in *McRaft* was the driver and sole occupant of a car "waiting at the traffic light at the corner of Mack and Hastings when someone, whom he identified as the defendant, opened the passenger door and entered the car. Continuing his testimony, he said that she told him to give her his money and, that when he answered that he had no money, she stated that she would "cut off (his) mother fucking head * * * ". The complainant testified that he had observed that she had her hands inside the pockets of her jacket and that he "figured she had something", however, he saw no weapon at that time. Mr. Barrow related that the assailant then "hit" him in the throat and fled …." *McRaft*, 102 Mich App at 206–07. This interaction undoubtedly took much longer than six or seven seconds, unlike the case at bar.

[4] It should be noted, as well, that the standard of review utilized by the *McAlllilster* Court was as follows: "The trial court's decision to admit identification evidence is reviewed for clear error." *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203, 206 (2000), remanded in part, app den in part 465 Mich 884; 636 NW2d 137 (2001). The clear error standard would have been one that the majority could not have overcome in this case, so it chose to invent a new one.

Ironically, the citation for the clear error standard is *People v Kurylczyk*, 443 Mich 289, 303, 505 NW2d 528 (1993), where the Court applied the *Neil* live showup factors to the scrutiny of a six-photo array identification procedure. Another irony in using *Kurylczyk* is that the defendant there challenged the photo of him in the six pack as being impermissibly suggestive because it singled him out. There is no six pack in this case. Mr. Thomas could not possibly be singled out anymore than he has already been by the showing of one single photograph of him to the witness.

The victim had been stabbed in the throat and had lost a lot of blood. *McRaft*, 102 Mich App at 207-08. A police officer went to the hospital and showed the victim three photographs. The victim identified the third one, a photograph of the defendant, as his assailant.[5] On appeal, the defendant alleged that "the complainant's weakened condition at the time of the photographic showup gave rise to a very substantial likelihood of misidentification, requiring suppression …." *McRaft*, 102 Mich App at 211. The majority states that the *McRaft* Court did not find the procedure impermissible suggestive even though the victim had been shown only two photographs. *Thomas*, majority at 4.

Again, *McRaft* differs from this case. In *McRaft*, the victim testified that he identified the defendant from a group of seven photographs shown to him in the hospital. *McRaft*, 102 Mich App at 207. After seeing three photographs, of three different people,[6] the victim identified the third photograph as the defendant. *McRaft*, 102 Mich App at 212 n 2. (It is not known whether the other four were then shown.) No one was singled out in the process used in *McRaft*. In this case, only one photograph was shown. There is not really any other way to single someone out more than by showing only that person's photograph. In any event, the *McRaft* Court was most focused not on the photographic display procedure but on the issue actually raised in *McRaft*, that being whether the victim's weakened state gave rise to a very substantial likelihood of misidentification, requiring suppression. The *McRaft* Court most certainly did not hold that a single-photograph identification in a hospital is permissible.

The majority itself noted that "the showing of a singled photograph is virtually always

[5] The majority states that the victim was shown only two photographs and identified the second one as the defendant. *Thomas*, majority at 4.

[6] It is assumed that the photographs were of different people because the victim described the first two as being of light-skinned people and the third being of a dark-skinned person. *McRaft* at 212 n 2.

suggestive." *Thomas*, majority at 4. To determine whether the showing of the single photograph in this case was impermissibly suggestive, the majority decided to consider the categories of circumstances outlined in *Neil* and used in *Kurylczyk*, cases that are not factually comparable to this case and the applicability of which are far from clear, as noted by Judge Shapiro in his dissent. *Thomas*, dissent at 10. *Neil* involved a live showup and *Kurylczyk* involved a six-photo array. In any event, the factors are discussed below.

Opportunity to view the assailant: The majority noted the victim saw the assailant twice, the first time was a three-second glance and the second time was for six or seven seconds; that the victim and the assailant were within two feet of each other during the robbery; that the victim testified that he got a good look at the assailant's face; that it was dark; that the victim said he was able to look at the face, clothing and gun; that he consistently described the assailant as young, dark-skinned, 5'9" and wearing a black hood. The majority noted the discrepancy in the description of weight, 145 vs. 200 pounds. The majority said the victim had the opportunity to observe but conceded that the observation time was short. *Thomas*, majority at 4-5.

As Judge Shapiro noted, however, although the majority said it had been dark, it failed to acknowledge the lack of street lighting and that the assailant's hair, ears, and part of his forehead and cheeks had been covered by a hood. *Thomas*, dissent at 10. The angle of the photograph, a side or three-quarter view, is also different than the head-on angle the victim testified about. (See Exhibit 2) Judge Shapiro noted that this Court unanimously held in *Gray* that a single-photograph identification was unduly suggestive even where the victim had spent over an hour with the assailant, who had raped her not once but twice and whom she had seen in both artificial and natural light. *Gray*, 457 Mich 111-114, 117-119.

Witness's degree of attention: Instead of noting that the victim's attention was divided among the gun, the clothing and the face, as Judge Shapiro noted in his dissent (*Thomas*, dissent at 12), the majority states that the victim "was able to note" size, age, skin-tone, clothing color, color and kind of gun being used, and that the gun was in the assailant's right hand. *Thomas*, majority at 5.

Accuracy of prior description: The majority asserts that "there is no dispute that the victim's description matched the defendant," yet it is not clear to which description the majority refers: the description of the assailant as 145 pounds, or 200 pounds? The description of the assailant as having no facial hair, or as having peach fuzz? The trial court noted that the victim's description "shifted subtly" from the preliminary examination to the evidentiary hearing. Exhibit 1 at 9. The majority concedes that the victim's description was general, but said it was "accurate." *Thomas*, majority at 5.

Level of certainty at the time of identification: The majority says the victim identified the person in the photo as the assailant within a few seconds after seeing it and had an emotional reaction. However, the victim had not yet been seen by a doctor, was simultaneously being pushed to another room as he was viewing the photograph, which was only four inches tall and not as wide (MT, 32) and was of the top half of Mr. Thomas's body and not just his face (see Exhibit 2), and the victim was bleeding. The emotional reaction could have been to the whole situation, not necessarily just to the photograph. The officer who showed Mr. Dykes the photograph was equivocal. She thought the emotion was both "like, shocked or, just – this is the guy." (MT, 34). The majority says the victim never failed to identify the defendant and never identified anyone else. This bold statement is not borne out by the facts. The victim never had

the opportunity to identify anyone else. He was shown one picture, and thereafter, he saw the defendant in court at counsel table.

Length of time between crime and confrontation: The majority notes that the time between the crime and the identification of defendant was between 30 minutes to an hour.

With respect to the circumstances of the showing of the photo to the victim, the majority states that the officer asked "was this him" but not that the picture was the assailant or that he was under arrest. The majority states the photo is merely a color photograph of a man near a building, but does not state that it was taken near the scene of the robbery and the photo does not indicate that the defendant was under arrest. One need not be under arrest for the police to believe that one committed a crime.

The majority then goes on to say that a single-photograph identification is comparable to a live, on-the-scene showup and disagrees with the trial court's assertion that the two cannot be analogized. The majority discusses the circumstances of several live showup cases and compares them to this case.

These comparisons are inapt for several reasons. First, the circumstances of the cases are very different.

In *People v Libbett*, 251 Mich App 353; 361; 650 NW2d 407 (2002), the victim was taken to the scene where he had been carjacked by two people and was shown four people. The very obvious different between *Libbett* and this case is that the victim was looking at four people, not one. The other very obvious difference is that the victim could presumably see all of the four people in person, not just a flat image of half of their bodies. There was no singling out in *Libbett*. The singling out is what gives rise to the impermissible suggestiveness in this case.

The majority discusses *Neil*, 409 US at 195, where the victim identified the defendant after a live showup. The circumstances of the victim's observation of the defendant in *Neil* were much different than here. The victim in *Neil* had spent at least a half hour with the defendant, who had raped her. Thus, she had been horrifyingly close to the defendant for a much longer period than the victim in this case. The victim in *Neil* had seen the defendant flooded in the light from a room in her house, as well as under the full moonlight. He had spoken to her during the crime and she heard his voice, saying the same things he had said to her at the time, at the live showup, as well, so hers was not merely a visual identification, but both a visual and a voice identification.

Finally, the majority minimizes the great disparity between a flat, partial photograph and seeing a live person's entire body in person. The majority fails to acknowledge the trial court's excellent discussion of the differences, those being differences in perspective when a live witness stands in front of a live suspect, and the witness can see the person's build and height. (MT, 77) The majority concedes that they are not the same thing, and says that each has its hazards, but believes that the harm to be guarded against is singling out. The majority's minimizing the differences between photographs and live viewings aside, if the majority was so concerned with singling out, how can anyone be any more singled out than by showing a witness just one photograph of one person? What was the witness to think? That the police would show him a single photograph every hour, in order to eliminate potential suspects? What else is the witness to think but that the police have apprehended this person and that they think they have their man?

The majority says the single-photograph identification in this case was like an on-the-

scene identification and that such an identification could have been accomplished had the victim not been in the hospital. That is not true. Mr. Thomas was not in custody and would have been under no obligation to remain at the scene where the police encountered him.

The majority states that the alternative would have been to keep an injured victim at the scene. That is also not true. There were many alternatives. One would have been to prepare a photo array using driver's license photos. Although not as easy for the police as preparing an array from mug shots, this could have been done. (MT, 63-64) Another alternative would have been to prepare a photo array using Mr. Thomas's driver's license photo and mug shots.[7] Another alternative would have been to arrest Mr. Thomas, take a mug shot and prepare a photo array with mug shots. Another alternative would have been to arrest Mr. Thomas and put him in a live line-up. Another alternative would have been to arrest Mr. Thomas and take him to the hospital for a live showup.[8] The alternative that was used, merely because it was convenient for an inexperienced police officer, was so impermissibly suggestive that it created a substantial likelihood of misidentification and it violated Mr. Thomas's right to due process.

There is no case law holding that the single-photograph identification procedure used in this case is permissible. In addition, as noted by Judge Shapiro in his dissent, in neither of two recent reports issued by the State Bar of Michigan Eyewitness Identification Task Force is such a procedure set forth as acceptable. *Thomas*, dissent at 8. The procedure used in this case is "one of the most suggestive photographic identification procedures that can be used." *Gray*, 457

[7] The officer in charge testified that this is what would be done if the suspect had not been arrested and there was no mug shot, although the driver's license photograph would look different from mug shot photographs. (MT, 55-57)
[8] Although the police officer who showed Mr. Dykes the photograph testified that police procedure would not have allowed a hospital showup (MT, 36-37), she also testified that she did not know proper photograph display procedure (MT, 37-38). Her estimations of what is and is not proper procedure are not necessarily credible.

Mich 107. Both of the testifying officers, the one who showed Mr. Dykes the photograph and the officer in charge, indicated that showing only one photograph was suggestive (MT, 42, 62). Although the officer in charge might show a witness one photograph when the witness and the suspect lived next door to each other and the witness knew the suspect's name (MT, 62-63), she stated that there was no policy or procedure for showing a witness only one photograph. (MT, 61)

The majority never disputed the trial court's findings of fact. It never stated that any of the findings were clearly erroneous or that it was left with the firm conviction that a mistake had been made. The majority merely decided that it was in a better position to review the testimony that the trial court actually heard and it came to a different conclusion than that reached by the trial court. The trial court's ruling was not clearly erroneous as a matter of fact or law and it should be affirmed.

II. The complainant had no independent basis to identify Mr. Thomas in court.

Standard of Review

The standard of review is the same as the previous issue.

While the majority of the Court of Appeals did not reach this issue, Judge Shapiro found in his dissent that the trial court's finding that there was no independent basis for the in-court identification. *Thomas,* dissent at 12.

The prosecutor has the burden of showing by "clear and convincing evidence" that

the in-court identification has a basis independent of the prior identification procedure. *Gray*, 457 Mich at 114-115. The independent basis inquiry is a factual one, and the validity of a victim's in-court identification must be viewed in light of the "totality of the circumstances." *Id.* at 116. Additionally, before the in-court identification may be received, the People must prove by clear and convincing evidence that the in-court identification has a basis independent of the prior identification procedure. *US v. Wade, supra*. Thus, these requirements are both state and federal.

In *People v Kachar*, 400 Mich 78, this Court listed eight factors to be used in determining if an independent basis for identification exists:

1. Prior relationship with or knowledge of the defendant;

2. The opportunity to observe the offense, including such factors as length of time or observations, lighting, noise or other factors affecting sensory perception and proximity to the alleged criminal act;

3. Length of time between the offense and the disputed identification;

4. Accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description;

5. Any previous proper identification or failure to identify the defendant;

6. Any identification prior to the lineup or showup of another person as defendant;

7. The nature of the alleged offense and the physical and psychological state of the victim;

8. Any idiosyncratic or special features of the defendant.

Kachar at 95-96, 252 NW2d 807.[9]

Mr. Dykes and Mr. Thomas did not know each other prior to the assault. Mr. Dykes testified

[9] In her opinion, Judge Heise noted that in *Gray*, the court stated that not all eight factors will always be relevant to every case because the independent basis inquiry is a factual one. Moreover, a court may put lesser or greater weight on any factor, depending on the circumstances. Also, the eight factors are not exhaustive. Certain relevant facts may exist in a given case that do not fit neatly into one of the eight categories. *Gray* at 117, n. 12.

that he saw his assailant for about three seconds on his way to the Coney Island and that the robbery transpired in six to seven seconds. There were no lights in the area of the two very brief encounters, it was dark, and the assailant was wearing black, which is hardly unique. The robber was half an arm's length away from Mr. Dykes during the robbery. "Although he was close, his ability to view the assailant was limited by the hood the assailant was wearing and by the fact that his attention was divided between the gun, his assailant's face and his assailant's clothing." *Thomas*, dissent at 12. He also testified that his·"adrenalin was up"·and he was highly emotional. Mr. Dykes was shown the photograph within an hour of the assault. The initial description of the assailant was in the most general of terms: a black male, wearing dark clothing. with a youthful appearance. The record does not reflect any previous proper identification prior to the showing of the photograph of another person as the assailant. Mr. Dykes could not identify any idiosyncratic or special features of Mr. Thomas. His offering of contradictory testimony regarding the assailant's facial hair "demonstrated the fact that his memory was subject to alteration so as to conform to what he saw in the enlarged print."[10] *Id*. There was a noteworthy discrepancy in the estimate of the assailant's weight, being either a slim 145 pounds or much heavier 200 pounds.

The prosecution did not meet its burden of showing by "clear and convincing evidence" that Mr. Dykes's in-court identification of Mr. Thomas had a basis independent of the improper identification procedure. The assault happened quickly, in the dark, by an unknown person whose description by Mr. Dykes shifted subtly between the preliminary examination and the evidentiary hearing. Further, the description provided to Officer Howell could have described

[10] Exhibit 1 attached hereto is the enlarged print of the cell phone photo that was put into evidence at the Motion Hearing.

many young men in the area where Mr. Thomas was photographed. Taken as a whole, there was not a sufficient independent basis for the in-court identification of Mr. Thomas apart from the suggestive identification procedure.

Judge Heise's ruling suppressing the in-court identification was supported by the facts and evidence of this particular case and was not clearly erroneous. Her order should be affirmed.

CONCLUSION

In conclusion, Mr. Thomas asks that his Honorable Court reverse the decision of the Court of Appeals and affirm the dismissal of his case by the trial court.

Respectfully submitted,

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